No. 958

In the
Supreme Court of the United States

OCTOBER TERM 1962

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Petitioner*,

vs.

WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington, entered in the above-entitled case on December 14, 1961.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Washington (App. A; R. 81-94) is reported unofficially in 159 Wash. Dec. 171, 367 P.(2d) 112 (1961).

JURISDICTION

The opinion of the Supreme Court of the State of Washington was entered on December 14, 1961 (App. A; R. 81-94). As permitted by the Washington Supreme Court Rule on Appeal 50 (RCW, Vol. 0, p. 28; App. B), a petition for rehearing (R. 95-105) was timely filed by petitioner on January 10, 1962. Rehearing was denied on February 13, 1962 (App. C; R. 106). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

HOW FEDERAL QUESTION IS PRESENTED

Petitioner first raised the question of the constitutionality of the tax involved herein in both the initial hearing held before the Washington State Tax Commission and the subsequent appeal of that ruling by petitioner to the Thurston County Superior Court (App. D; R. 3-16). On May 19, 1960, the Thurston County Court ruled that the gross receipts tax imposed by respondents on petitioner was a direct burden upon interstate commerce, in violation of the Commerce Clause of the Federal Constitution (App. E; R. 33-43). The respondents appealed, and in the decision of the Washington State Supreme Court (App. A; R. 81-94), the ruling of the Thurston County Court was reversed in part and it was held that the tax in question did not discriminate against interstate commerce (App. 9A; R. 90), and that it did not impose a risk of multiple tax burden not borne by intrastate commerce (App. 10A; 11A; R. 91), and was not a taking of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution (App. 7A; R. 87, 88).

QUESTION PRESENTED

This appeal raises the question whether the Washington gross receipts tax imposed on petitioner is a burden on interstate commerce prohibited by the Commerce Clause of the Federal Constitution, a taking of property without due process of law, and an establishment of a classification prohibited by the Equal Protection Clause, where it is shown that:

(a) The petitioner-taxpayer is a non-profit corpora-

tion, and is engaged exclusively in facilitating shipments through interstate commerce on behalf of its members;

(b) Petitioner owns no property, hires no employees, makes no sales, and engages in no business whatsoever other than making general policy decisions and entering into contracts with independent contractors;

(c) All of the actual physical activities involved are effected by independent contractors, located both in Washington and in other states, and that the independent contractors pay their respective tax burdens for such activities;

(d) The tax in question is a gross receipts tax measured by the charges made by the aforesaid independent contractors, all of the activities of which are in furtherance of the interstate shipments.

CONSTITUTION AND STATUTES INVOLVED

The Washington statutory taxing provisions involved are: Section 4 of Chapter 180, Laws of Washington 1935, p. 709, as amended, being RCW 82.04.220; Section 4(e) of Chapter 180, Laws of Washington 1935, pp. 710-711, as amended, being RCW 82.04.290; and Section 1 of Chapter 91, Laws of Washington 1953, p. 172, as amended, being RCW 82.04.296 (App. F). It should be noted that the last section above, namely RCW 82.04.296, would apply to the situation in question (assuming the tax applies at all), until the enactment of the last sentence of RCW 82.04.290 in Section 5 of Chapter 5, Laws of Washington 1959, First Extraordinary Session, p. 1668.

The imposition of the taxes sought in this action is

claimed by petitioner to be in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner, Washington-Oregon Shippers Cooperative Association, Inc. (WOSCA), is a non-profit corporation duly organized and existing under the laws of the State of Washington (R. 20). Petitioner's membership consists of 119 various business entities whose principal places of business are in either the State of Washington or the State of Oregon. The business of all these members entails the purchase, from sources of supply outside the states of Oregon and Washington, of various commodities (R. 21). The sole purpose of plaintiff's existence is to make possible the shipment into the states of Washington or Oregon, in interstate commerce only, of these various commodities required by its members at the lowest possible cost, that is, at carload rates (R. 21). Each member orders independently of petitioner such freight as may be necessary for its business; such freight as the member desires to be shipped through petitioner is directed to be shipped to the member in care of petitioner (R. 21, 22). Petitioner has contracts with independent freight consolidators in various eastern and midwestern cities, which receive and consolidate the aforesaid freight and then ship it to the members in care of petitioner to the State of Washington or State of Oregon (R. 21, 22). The ship-

ments received at the designated points in Washington are sorted and delivered to the purchasing members by a freight distributor who performs these services pursuant to a contractual agreement with petitioner (R. 26, 27).

Payment for the charges made by the freight consolidators, the railroads, the freight distributors, and the warehousemen, is made to petitioner by the individual members pursuant to a billing (R. 23). This billing is prepared by Fred H. Tolan & Associates, Traffic Consultants, in Seattle, pursuant to a contract with petitioner (R. 23). This billing consists of the following charges: 1) Lowest applicable railroad carload rates per 100 pounds, 2) Loading and consolidation, 3) Railroad stop-off charge, 4) All-risk insurance, 5) WOSCA overhead, 6) Administration and billing, 7) Unloading and segregation, 8) Store door delivery (App. 13A; R. 94). In each case the billing to the individual member is the precise amount of its share of the freight, with the other charges prorated as precisely as possible to each individual member; each such billing is payable immediately (R. 23).

The payments to the various independent contractors are made from the operating capital of petitioner, which operating capital is derived as follows: At the time each member is accepted by the Board of Trustees of petitioner the member is required to pay an amount equal to the member's best estimate of what would be the member's largest freight bill for any one week during the year. If at any time it develops that any one week's freight bills are in excess of said amount, the

member is promptly advised and must contribute immediately such additional sum as may be necessary. This fund remains continuously in a checking account. All billings must be paid within one week by the member to the end that the fund may remain substantially intact. Any withdrawing member is paid back at the time of its withdrawal all of its advance to operating capital (R. 24).

Petitioner owns no property of any nature and has no employees (R. 27). Petitioner's work is all performed by independent contractors, save and except for policy decisions of petitioner's Board of Trustees (R. 27). No officer or trustee of petitioner receives any salary and no stock is issued to any member (R. 21). Fred H. Tolan & Associates pay the usual Washington State Business & Occupation taxes on amounts paid for its services, and the consolidators and distributors in the various states pay their own Business & Occupation tax in any jurisdiction where the same may be imposed (R. 25). Petitioner does no business save that set forth hereinabove (R. 25).

This action was commenced on September 8, 1959, in the Thurston County Superior Court by petitioner under Section 198 of Chapter 180, Laws of Washington 1935, p. 837, as amended, being RCW 82.32.150, and Section 199 of Chapter 180, Laws of Washington 1935, pp. 837-838, as amended, being RCW 82.32.180 (App. G) for the purpose of obtaining an injunction against the collection by the Washington State Tax Commission of the Business & Occupation tax (R. 3-16). The tax sought by the state was measured by all items billed

by petitioner to its members under the billing procedure above-described, including railroad freight charges (R. 23). On May 19, 1960, a permanent injunction was granted by the Thurston County Superior Court (R. 44, 45) enjoining the Tax Commission from the collection of the taxes in question, in accordance with its memorandum opinion holding the taxes violated the Commerce Clause of the Federal Constitution (App. I; R. 29-32). From this judgment the Tax Commission appealed, but limited its appeal to that portion of the Thurston County judgment enjoining the collection of taxes measured by gross proceeds which: (1) are obtained from *Washington* members of petitioner, and (2) are in addition to those amounts paid by these members for the actual carrying of the commodities by the railroad (App. 4A, 5A; R. 85).

In its decision the Washington Supreme Court reversed the lower court, excepting that portion of the tax measured by the railroad stop-off charge apportioned to petitioner's members (App. 12A; R. 92, 93). In so holding, the Washington Supreme Court ruled that the tax in question did not discriminate against interstate commerce and did not impose a risk of a multiple tax burden thereon, and did not violate the Due Process Clause of the Fourteenth Amendment. Petitioner timely filed its petition for rehearing to the Washington Supreme Court on January 10, 1962 (R. 95-105). The petition was denied by the Washington Supreme Court by an order filed on February 13, 1962 (App. C; R. 106), and the judgment herein sought to be reviewed became final (App. J; R. 107).

REASONS FOR GRANTING THE WRIT

I. The decision of the Washington Supreme Court is in conflict with *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

Petitioner submits that the case at hand should be controlled by the prior ruling of this Court in the *Gwin* decision. Both are cases arising from the application of the Washington business and occupation tax to interstate shipping. The factual variations between the cases are minimal. The taxpayer in *Gwin* gathered goods from its principals within the taxing state and arranged the transportation of same to points outside; in contrast, petitioner arranges for the consolidation of goods in points outside the taxing state and then effects their transportation to the State of Washington and distribution to petitioner's principals therein. Further, the taxpayer in *Gwin* engaged in sales activities and gained profits thereon, neither fact being true of petitioner. The cases are also distinguished factually in that the *Gwin* taxpayer used employees and "representatives" to effect its operations, while petitioner owns no property whatsoever, and engages independent contractors to perform all its business. It is submitted that if the above factual distinctions are to be given any effect at all, it should be that the tax imposed on petitioner is *a priori* more burdensome upon interstate shipping.

The opinion of the Washington Supreme Court distinguished the *Gwin* decision on the ground that with respect to petitioner, "[n]o representatives are present in other states . . ." (App. 10A; R. 92). Since petitioner engages independent contractors in other states to perform loading and consolidation functions (Item 1 in

App. 13A; R. 94), it would appear that the Washington court has distinguished the *Gwin* decision on the factual variance that petitioner employs independent contractors, rather than "representatives" to perform its interstate activities. It is suggested that Justice Holmes' remark that "'[c]ommerce among the several states' is a practical conception", and hence not subject to the "witty diversities" of the law of sales, should apply with equal force to the distinction used by the Washington court arising from the law of vicarious tort liability. *Rearick v. Pennsylvania*, 203 U.S. 507 at 512 (1906). Since petitioner is a non-profit corporation, any tax imposed by Massachusetts, New York, Pennsylvania, Illinois, or Missouri, on petitioner's loaders and consolidators, must eventually be directly reflected in the cost to petitioner for such services, which, in turn, must be passed directly to petitioner's members. The multiple tax burden is just as real whether it is effected through "representatives" or independent contractors. "What is decisive is the nature of the act, not the person of the actor." *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, at 94 (1937).

In addition to being in conflict with the *Gwin* decision, the opinion of the Washington Supreme Court is contrary to principles stated in subsequent commerce clause decisions of this Court, and would extend the state taxing power much further into the operation of interstate commerce activities than ever before authorized by this Court. It must again be emphasized that petitioner owns no property, makes no sales, earns no profits, and engages in no business whatsoever, other than that of entering into contracts with independent

contractors who pay their respective tax burdens for all the physical activity resulting thereby; further, only interstate shipments are effected by the aforesaid independent contractors. These facts distinguish the case at hand from those many decisions of this Court wherein the taxpayer was engaged in both intrastate and interstate activities, and hence a fairly apportioned tax was justified on the desirability of making interstate commerce pay its fair share of the tax burden. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Similarly distinguishable are those cases where the taxpayer was engaged "exclusively in interstate commerce", but thereby engendered certain activities within the taxing state which would be free of the usual tax burden thereon unless a fairly apportioned tax were permitted. See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

II. The State of Washington has no jurisdiction under the due process clause of the Federal Constitution to impose the tax herein.

In holding that petitioner's activities were within the jurisdiction of the state taxing power, the Washington Supreme Court stated that "... WOSCA is providing services, and is thereby engaging in business within this state." (App. 6A; R. 87). Nevertheless, the opinion does concede that the only real activities performed by petitioner are the policy-making function of its Board of Trustees, and that of entering into contractual arrangements with independent contractors (App. 5A; R. 85). Since there are no charges with which either of the latter functions can be related, except conceivably the item designated as "WOSCA overhead" (Item 4 in

App. 13A; R. 94), there would seem to be some question whether the State of Washington has jurisdiction to impose a tax measured by charges made by petitioner's independent contractors which pay their respective Washington tax burdens. In other words, the tax herein appears in violation of the requirement implied in recent decisions of this Court, that the taxing power must bear a fiscal relationship to the opportunities, protection, and benefits afforded by the taxing state. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940), *reh. den.*, 312 U.S. 712 (1941).

An even more serious question of nexus arises with respect to that substantial portion of the tax which is measured by the charges made by petitioner's independent contractors engaged in loading and consolidation activities outside the State of Washington. In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, at 464 (1959), this Court found sufficient nexus for the reason that "[t]he taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State."

III. The imposition of the Washington business and occupation tax, as applied to petitioner, constitutes a direct burden on interstate commerce prohibited by the commerce clause.

It is true that the most recent decisions of this Court contain statements casting doubt upon the present day validity of the rule that a tax imposed on a taxpayer engaged exclusively in interstate commerce is a direct burden prohibited by the commerce clause. *Cf., Northwestern States Portland Cement Co. v. Minnesota*, 358

U.S. 450 (1959). However, such cases as *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), have never been expressly overruled, and the actual holding in the *Northwestern States* case may simply illustrate the difficulty of reconciling generalizations such as the "engaged exclusively in interstate commerce" axiom with the oft-quoted requirement that interstate commerce pay its fair share of the local tax burden.

In the *Northwestern States* decision, both in Case No. 12 and No. 33, the taxing state was seeking to impose a net income tax on profits made by foreign corporations, apportioned to business done within the taxing state by such corporations; both taxpayers in *Northwestern States* maintained sales offices within the taxing state, hired employees therein, and owned at least a minimum amount of property therein. Hence, the actual holding of *Northwestern States* simply imposed the same tax on actual physical activities occurring within the taxing state as part of an interstate transaction, as would be imposed on these same activities if part of an intrastate transaction (the activity in each case being the sale of goods and profits thereon). In contrast, in the case at hand, petitioner's independent contractors are presently paying all the state tax burden normally charged for all of the actual physical activities effected and upon which the tax in question is measured.

If, rather than acting as an agency to enable its members to consolidate their shipping, petitioner instead engaged in such consolidation as a business and charged a fee for such services, then under the ruling of the

Northwestern States case, the validity of the tax in question might well have to stand or fall on the sole issue of whether the tax imposed either a discriminatory burden, or the threat of a multiple burden. However, as applied to petitioner, the practical operation of the tax in question is much more impressive in its exclusive application to interstate shipping than is the tax in *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 (1951), which was found to be a tax on the "privilege of doing interstate business," and therefore void.

IV. Imposition of the Washington business and occupation tax on petitioner, in its practical operation, effects a discriminatory burden upon interstate commerce.

Petitioner contends that the tax in question works two separate and equally objectionable types of discrimination: First, the tax in its practical operation places a burden on interstate shipping not borne by comparable intrastate shipping activity. Second, the tax as construed by the Washington Supreme Court herein effects a burden on smaller interstate shippers not borne by larger interstate shippers.

With respect to the first type of discrimination, it is only in transportation of commodities in interstate commerce, with its longer distances and proportionately greater railway rates, that an organization such as petitioner's is economically necessary or feasible. Further, in these days of mass production and high volume sales, as the costs of transportation and marketing goods become an ever-increasing percentage of the final cost of goods, it becomes increasingly necessary for interstate shippers to obtain the savings resulting from consolida-

tion if they are to market such goods in competition with locally manufactured items. If the Washington decision herein is upheld, then such interstate shippers will be subject to the burden of paying the Washington business and occupation tax on the gross receipts of petitioner, based on the charges imposed by petitioner's independent contractors, over and above the same tax paid by the same independent contractors doing the actual loading, unloading, and related activities. Since the latter tax is paid by such independent contractors as to both their interstate and intrastate shipments, it evolves that in its practical operation the tax in question constitutes a double tax burden over that required for comparable intrastate shipments.

While the Washington Court apparently recognized this economic effect of the tax (App. 9A; R. 89), its response was simply that "the state however, by virtue of this statute, is merely requiring interstate commerce to pay its own way; a permissible objective," citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). However, the *Western Live Stock* case expressly held that the tax imposed there did not discriminate against interstate commerce, and indeed, petitioner knows of no case wherein the axiom that "interstate commerce must pay its own way" has been employed to validate a discriminatory tax.

Nor should it make any difference that the discrimination in the case at hand results from the practical operation of the tax combined with subtle economic factors, rather than being indicated on the face of the taxing statute. In *Best & Co. v. Maxwell*, 311 U.S. 454 at 455, 456 (1940), this Court stated:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

Some mention should also be made of the Washington State Tax Commission's decision to refrain from appealing that portion of the trial court decision enjoining the collection of tax on proceeds from the Oregon members of petitioner, and the tax based on amounts paid by members for the actual shipping charges of the railroad for carrying such commodities (App. 4A, 5A; R. 85). In so acting, apparently the state is attempting to make the tax appear as a properly apportioned tax, and hence fall under the rule of such cases as *Carlton Railroad Co. v. Rogan*, 340 U.S. 511 (1951). However, it must again be remembered that all of the physical activities by which the tax in question is measured are performed by independent contractors which already pay their respective tax burdens. As conceded by the Washington Court, the actual activity of petitioner consists only of making policy decisions, and entering into contracts with the independent contractors. The tax in question can scarcely be considered as "apportioned" or in any way measured by the aforementioned activities.

With respect to the second type of discrimination caused by the tax in question, the same economic factors mentioned above also operate to make it increasingly necessary for the smaller interstate shipper to obtain the same consolidation savings effected by those

shippers such as national mail order houses doing a sufficiently large volume of shipping that they may consolidate their own individual interstate shipments. In ruling the tax herein constitutional, the Washington Court stated that the members of petitioner "could arrange their transactions individually, and enjoy the tax immunities of the commerce clause" thereby (App. 11A, 12A; R. 92). It is a practical impossibility, of course, for the individual members of petitioner to consolidate their shipping without combining their shipments through the agency of petitioner. They simply do not do a large enough volume of business to make such consolidation possible, without waiting an undue length of time to accumulate carload lots. Hence, the Washington Supreme Court opinion gives a tremendous tax immunity to the large interstate shippers which the state forbids the smaller interstate shippers, even though in each case the same amount of actual interstate shipping is involved. That such discrimination is totally unjustified in reason, is emphasized when it is remembered that in either case bookkeeping is necessary to effect a consolidation; again, the implied distinction appears to be that petitioner's members employ independent contractors to effect such bookkeeping, while a single large interstate shipper would normally use its own employees to do this. In either event, however, the actual physical activity with which a tax is measured is identical.

It is submitted that this discrimination as between different classes of interstate shippers is prohibited by the commerce clause, as well as discrimination between interstate and intrastate business. This principle is in-

dicated in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 at 56 (1940), which states:

> "While a state, in some circumstances may, by taxation, suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, [citing cases] . . . it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute."

V. The Washington business and occupation tax, as applied to petitioner, exposes interstate commerce to multiple tax burdens to which local commerce is not subject.

In applying the multiple burden test to the case at hand, the Washington Court stated that petitioner did not affirmatively show that it was ". . . subject elsewhere to taxation for the activity in which it engages or the services it renders. Indeed, on the basis of the facts before us, it is extremely doubtful if any other state could levy a similar tax on WOSCA." (App. 10A; R. 91). In so concluding, the Washington opinion ignores that portion of the tax which is measured by the loading and consolidation charges made by petitioner's independent contractors located in Massachusetts, New York, Pennsylvania, Illinois, and Missouri, which are subject to any tax imposed by these states for such activities. Further, it is a stipulated fact that such independent contractors pay the taxes duly imposed by their respective states (R. 25). Since any tax imposed on the independent contractors engaged by petitioner must necessarily be passed on directly to petitioner's members, there is a risk of multiple burden with respect to the loading and consolidation charges.

The Washington Court answers this contention, by saying that petitioner has no contacts in these other states, save its contractual ties, as distinguished from having "representatives" present in the other states (App. 10A; R. 91). It is submitted that the multiple burden test measures economic realities, and not agency-independent contractor distinctions which smack of "direct-indirect" distinctions of which the Washington Court itself disapproves (App. 7A; R. 88).

The Washington opinion further states that petitioner's activities in the other states are *de minimus* (App. 10A; R. 91). However, as seen from the itemization of charges the tax on the loading and consolidation activities constitutes as much as one-third of the total tax involved (App. 13A; R. 94), and hence, the *de minimus* characterization seems inappropriate.

It is helpful again to examine *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939), wherein this Court, after finding that a substantial part of the taxpayer's activities was outside the taxing state, and finding that the tax was measured by the amount of commerce, *i.e.*, by the number of boxes of fruit transported from Washington to outside states, therefore concluded at page 439 that the tax ". . . if sustained [would expose the taxpayer] . . . to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject." It is suggested that in the case at hand a substantial portion of the physical activities involved are performed outside the State of Washington, and that the tax in question is measured by the amount of commerce, *i.e.*, the total number of

railroad cars consolidated, loaded or unloaded, and that hence the entire tax herein, as in the *Gwin* case, should be held unconstitutional.

VI. The tax in question, as construed by the Washington Supreme Court, effects a classification so arbitrary and discriminatory as to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

In seeking to distinguish the *Spector Motor* case, the Washington Supreme Court ruled that the individual members of petitioner could arrange their transactions individually, rather than through the agency of petitioner, and thereby enjoy the tax immunities of the commerce clause (App. 11A, 12A; R. 92). The essence of this holding is that the members cannot do collectively, through the agency of petitioner, what they could do individually, without imposition of the additional tax burden. The practical effect of this ruling will be to impose a double tax burden on the small interstate shippers, while the large interstate shippers will not be so penalized. Petitioner submits that such a classification is unreasonable, arbitrary, without justification, and in violation of the equal protection clause of the Fourteenth Amendment.

In *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 at 400 (1928), this Court held a gross receipts tax unconstitutional, stating that while the equal protection clause did not forbid classification, "'. . . it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation'." Applying this principle to the case at hand, it

should be noted that whether small interstate shippers operate through organizations such as petitioner, or large shippers operate individually, the actual physical activity upon which the tax is measured is identical (loading, consolidation, unloading, delivery and related activities.)

VII. The tax imposed herein is inequitable, and will produce adverse economic effects on interstate commerce, contrary to sound public policy.

If the decision appealed from is upheld, the tax in question will have two undesirable effects: (1) It will make importing certain interstate goods prohibitive in many cases, and thereby give local manufacturers (and large out-of-state manufacturers with local outlets) an advantage over small out-of-state manufacturers; (2) It will give the large Washington interstate shippers an economic advantage over the small interstate shippers.

Organizations such as petitioner are created by the smaller interstate shippers in an attempt to restore some equality with respect to shipping costs. It should be noted that with the greater proportion of the nation's manufacturers being located in eastern states, the transportation factor is especially critical for western interstate shippers.

With modern society becoming increasingly complex and interdependent, it is even more important today than when the Constitution was first drafted that the individual states not be allowed to interpose tariff barriers among themselves. It is true, as was stated by this Court in *Richfield Oil Corp. v. State Board of*

Equalization, 329 U.S. 69 at 75 (1946), that commerce clause decisions have required the Court "'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.'" In weighing these competing demands in the instant case it is important to remember that the members of petitioner are paying their fair tax burden for the activities involved.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

OPINION OF SUPREME COURT OF WASHINGTON

159 Wash. Dec. 171, 367 P.(2d) 112

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Respondent*, vs. WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Appellants*.

No. 35726

Department Two

Filed December 14, 1961.

In this lawsuit respondent, Washington-Oregon Shippers Cooperative Association, Inc., (hereinafter referred to as WOSCA) is seeking to enjoin the State Tax Commission from collecting certain business and occupation taxes. The taxes were assessed pursuant to those provisions of Chapter 180, Laws of 1935 (as amended), which are presently codified as RCW 82.04.220 and RCW 82.04.290. WOSCA alleged that its business is entirely interstate in character, and that the tax amounted to (1) a direct burden on interstate commerce, violative of the commerce clause of the Federal Constitution; and (2) a taking of property without due process of law in violation of the fourteenth amendment of the Federal Constitution and Art. I, § 3, of the Washington State Constitution. The trial court enjoined collection of the taxes, holding them to be a direct burden on interstate commerce.

Much of the following information describing the functions and operations of WOSCA is taken from the facts as stipulated by the parties litigant in trial court.

WOSCA is a nonprofit corporation, organized and existing under and by virtue of the laws of the state of

Washington. Corporate membership consists of 119 business entities, with principal places of business in either Washington or Oregon—primarily in Seattle or Portland. Each member is engaged in a type of business involving acquisition and transportation of materials or products from sources outside the state of Washington. Carload, truckload, or volume rates usually are most advantageous; but members shipping individually often cannot order in quantities large enough to secure such lower rates. WOSCA was formed to provide services or the means whereby members would be able to consolidate shipments in order to gain the advantage of the volume (usually carload) rates. WOSCA handles no shipments of merchandise originating in Washington, and its services are available only to its members. WOSCA qualifies for an exemption under 49 U.S.C., § 1002(c), and, therefore, is not subject to regulation by the Interstate Commerce Commission as a *freight forwarder.*

Each corporate member orders (independently of WOSCA) whatever commodities it desires. Thereupon, the commodities are shipped from the seller in care of WOSCA to loading or consolidation points in various eastern, midwestern and southern cities. An independent consolidator at the loading point, working pursuant to a contract with WOSCA, arranges the less-than-carload shipments in carload lots and directs the shipments to members (in care of WOSCA) at a convenient point in Washington or Oregon. (As a matter of practice, about 80% of the shipments come to Washington for the reason that most of the 119 members are established here. In this appeal we are not concerned with transactions involving Oregon members.) The shipments received at the designated points in Washington are sorted and delivered to the purchasing members by a distributor (who also works under a contractual arrange-

ment with WOSCA). WOSCA has leased a warehouse in Seattle, where volume is greatest, for storage of the freight until distribution. Ownership of the merchandise in transit depends upon the contractual relationships between the buyers and sellers. Accordingly, each member handles its own claims when damage in shipment occurs.

A bill of lading and a manifest, setting forth the ownership and description of various components making up the carload, are prepared by the consolidator at loading point and delivered to the railroad or other carrier. A duplicate of each is sent to the firm of Fred H. Tolan & Associates, in Seattle, which functions as "Traffic Consultant." This firm, pursuant to a contract with WOSCA, handles the latter's records, pays freight and other charges due the carriers and independent contractors out of the operating capital of WOSCA, and also bills individual members for services performed.

The billings to individual members cover (a) the amount of freight, (b) the amount of the consolidator's charge, including any advance made by the consolidator for the individual member, and (c) an agreed amount per hundredweight for services performed by Fred H. Tolan & Associates. The billings also include various service charges, as itemized in the Appendix attached hereto. Miscellaneous expenses are added to the bill of each member according to an agreed apportionment arrangement. Payments are made to WOSCA, and deposited in its account.

The operating capital of WOSCA is derived as follows: Each member is required to pay an amount equal to its best estimate of its largest weekly freight bill. If such estimate proves to be inadequate for covering expenses of operation, the member is so advised promptly

and requested to make a larger contribution. As long as members make payments promptly, the fund thus established remains substantially intact. Any withdrawing member receives return of his deposit or whatever portion is left of it. There are no shares of stock. In the event excess money accumulates, each member receives a "dividend," apportioned according to the tonnage shipped.

Fred H. Tolan & Associates pay the usual state and city business and occupations taxes on all sums paid for services rendered. The independent consolidators and distributors pay their own business and occupations taxes if required in their jurisdictions.

WOSCA owns no property. Its work is performed by independent contractors, except for corporate policy and planning decisions made by the Board of Trustees. No office is maintained; the contract with Fred H. Tolan & Associates requires that firm to provide all office supplies and equipment. The corporate name of WOSCA has two telephone listings in Seattle: one at the warehouse leased by WOSCA; the other at the offices of Fred H. Tolan & Associates.

The State Tax Commission originally sought to collect the tax by measuring all sums paid by each member of WOSCA for freight bills, together with service charges added thereto. However, no tax was claimed measured by that portion of the billing representing advances by consolidators at loading points. The Tax Commission has abandoned a portion of its claim for taxes, since it is appealing only insofar as the trial court judgment enjoins the collection of taxes measured by those gross proceeds which (1) are obtained from Washington members of WOSCA for services rendered by WOSCA, and which (2) are in addition to amounts paid by these members for the actual transportation

charges by carriers. The Tax Commission, then, is maintaining that all proceeds derived from charges for services itemized in the Appendix attached hereto, which are paid to WOSCA by its Washington members, are properly includable in the measure of the tax.

It will be observed that some of the services included in the measure of the tax involve activity occurring outside of the State of Washington. Logically, perhaps, the question of whether or not the state has jurisdiction under the due process clauses of the Federal and State Constitutions to tax proceeds derived as a result of those activities should be answered before the commerce clause implications are discussed. Is the tax fairly apportioned to services rendered in Washington? Or, to put it another way, does the tax amount to an attempt by the State of Washington to extend its taxing powers outside of its boundaries?

WOSCA makes no purchases or sales in interstate commerce. The only real activity performed by WOSCA, except for the policy-making function of its Board of Trustees, is that of entering into contractual arrangements with independent contractors. Although some of the contracts entered into by WOSCA concern activities occurring outside of the state, WOSCA is not engaged in these activities; it merely procures them as a service for its members. Such service also includes: use of the corporate name when shipping items; immediate payment of shipping charges; providing all risk insurance; door delivery service; regular billing service, enabling satisfaction of all charges with one payment. The performance of these services is a local activity, even though the services are rendered in connection with an interstate transaction. See *Mohegan International Corp. v. City of New York* (1961), 9 N.Y.(2d) 69, 172 N.E.(2d) 546; *cert. den.* 366 U.S. 764, 81 S.Ct.

671; 6 L.Ed.(2d) 854 (1961). Local activity far more obscure was held validly taxable in *B. F. Goodrich v. State* (1951), 38 Wn.(2d) 663, 231 P.(2d) 325; *Cert. den.* 342 U.S. 876.

That transactions occur between WOSCA and its members cannot be denied. WOSCA promotes and provides services, and members make payments to WOSCA for these services. It is axiomatic that a corporation exists as an entity, separate and apart from its members. The gross receipts received from these transactions between the corporation and the members may be taxed, because WOSCA is providing services and is thereby engaging in business within the state. The fact that a portion of the service provided by WOSCA involves activities which occur outside of the state is not controlling.

In *Wisconsin v. J. C. Penney Co.* (1940), 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, *reh. den.* 312 U.S. 712, 61 S.Ct. 444, 85 L.Ed. 1143, the court said:

> "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

Furthermore, the member companies which eventually will bear the burden of the tax are located within the state of Washington. The object and effect of the organization is to produce a local competitive advantage rather than to benefit those on the other end of the interstate transaction. This was recognized in *Pacific Coast Wholesaler's v. United States* (1949), 81 F.Supp. 991, D.C. Cal.; aff'd. 338 U.S. 689, 70 S.Ct. 411, 94 L.Ed. 474 (1950), where an operation similar to that of WOSCA was held within the exemption of 49 U.S.C., § 1002(c). The court stated:

> "... both the purpose and the result of the transaction is not to benefit the shipper but to reduce

transportation costs to the member through savings effected in cooperation with other members who likewise employ the Association as a transportation agent."

To invalidate the tax on the basis that the state is extending its taxing power beyond its jurisdiction discounts too severely the following factors: (1) WOSCA enjoys the benefits of Washington law by virtue of its creation; (2) WOSCA performs substantially all of its services within the boundaries of the state of Washington; (3) WOSCA is composed of members who are all established in the state of Washington; (4) the effect of the tax would be borne primarily in the state of Washington; in other states it would be almost imperceptible. We hold that the tax is not invalid on the ground of due process.

The next question for discussion is whether commerce clause implications prevent the state from assessing a tax measured by gross receipts received by WOSCA for the indicated services.

WOSCA relies on *Puget Sound Stevedoring Co. v. Tax Commission* (1937), 302 U.S. 90, 82 L.Ed. 68, 58 S.Ct. 72, for the proposition that the activities of WOSCA are so closely connected with interstate commerce that WOSCA should be immune to the tax by virtue of the commerce clause. We do not agree. The opinion is based upon formalistic, doctrinaire reasoning of earlier days, emphasizing the direct-indirect distinction and an inherent suspicion or misunderstanding of gross receipts taxes. The more recent pronouncements of the United State Supreme Court have made *Puget Sound Stevedoring* something less than a strongly persuasive precedent.

Obviously the end result of the transactions described herein is that members of WOSCA purchase articles

from out of state and have them delivered in the state. Regardless of the details, it must be admitted that some interstate commerce activity results, and that WOSCA is somewhat involved in the process. In a strict sense or limited frame of reference, any tax on WOSCA would have some effect on interstate commerce. Obviously too, the independent consolidators and distributors perform the jobs of assembling and dispersing at points in time which precede or follow the actual movement across state lines. In this sense, their activities may be characterized as local and subject to state taxation, although interstate commerce may be directly affected. *Convoy Company v. Taylor* (1959), 53 Wn.(2d) 439, 334 P.(2d) 772; *Martin Ship Service Co. v. City of Los Angeles* (1950), 34 Cal.(2d) 793, 215 P.(2d) 24; *cf. Canton R. R. v. Rogan* (1951), 340 U.S. 511, 71 S.Ct. 447; *Minnesota v. Blasius* (1933), 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131.

Since the decision in *Western Livestock v. Bureau of Internal Revenue* (1938), 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, the primary considerations for determining the limits of a state's power to tax activities connected with interstate commerce have been these: (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; *the discrimination test.* (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; *the multiple burden test.* That the latter has become increasingly important is shown by *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 421.

WOSCA contends that the tax discriminates against interstate commerce because the service which

the organization provides is practicable only when great distances are involved and savings by volume rates are substantial. The state, however, by virtue of this statute, is merely requiring interstate commerce to pay its own way: a permissible objective. *Western Livestock v. Bureau of Internal Revenue* (1938), 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823.

Pursuant to RCW 82.04.220,

> "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities."

The tax is applied to *everyone* engaging in business.

> "'Engaging in business' means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers . . ." RCW 82.04.150.

As the United States Supreme Court said in *McGoldrick v. Berwind-White Co.* (1940), 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565,

> ". . . [I]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business."

The Washington legislature has passed a general tax applicable to all who come within the terms of the statute. The tax does not amount to an extra burden not borne by those engaged solely in intrastate commerce; nor does it erect barriers to the disadvantage of out-of-state competitors. It cannot be said then that the tax is discriminatory. *Cf. Norton v. Department of Revenue* (1951), 340 U.S. 535, 71 S.Ct. 377, 95 L.Ed. 517.

We must next determine whether the *multiple burden* test is satisfied.

> "Not every local tax laid upon gross receipts de-

rived from participation in interstate commerce is forbidden." *Gwin, White & Prince, Inc. v. Henneford* (1937), 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272.

"When there is no danger that several states will impose cumulative tax burdens on the same subject, a tax upon an activity that is a local incident of interstate commerce may be measured by gross receipts from that activity." Traynor, Judge, in *Martin Ship Service Co. v. City of Los Angeles* (1950), 34 Cal.(2d) 793, 215 P.(2d) 24.

In order to invalidate a state tax on interstate commerce on the ground that a multiple burden exists, the taxpayer must show that the burden exists. *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.(2d) 421. (Creating a risk of multiple burden is of course discrimination, so in that sense the "multiple burden test" is encompassed by the "discrimination test.") It is not affirmatively shown that WOSCA, as an entity, is subject elsewhere to taxation for the activity in which it engages or the services it renders. Indeed, on the basis of the facts before us, it is extremely doubtful if any other state could levy a similar tax on WOSCA. Washington is the state of incorporation. No offices are maintained in any other state, as in *Norton v. Department of Revenue* (1951), 340 U.S. 535, 71 S.Ct. 377, 95 L.Ed. 517. WOSCA has no contact in any other state save its contractual ties with the various independent consolidators in the various places. No property is owned anywhere. No representatives are present in other states, as was the situation in *Gwin, White & Prince, Inc., v. Henneford, supra.* Since virtually all activities of WOSCA are carried out by the firm of Fred H. Tolan & Associates in Washington, and since the activities in other states are *de minimus,* there is no possibility of a dupli-

cate tax. The *multiple burden test* is therefore satisfied; hence, we hold that the tax in question is not invalid as an undue imposition on interstate commerce.

Further mention should be made of *Gwin, White & Prince, Inc., v. Henneford, supra*, since it is one of the major cases relied on by WOSCA. In *Gwin*, a tax levied by the state of Washington was held unconstitutional as applied to the taxpayer who was in the business of marketing fruit shipped from Washington to places of sale in other states and foreign countries. The United States Supreme Court held that the tax

> ". . . though nominally local . . . in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

Emphasis was placed on the operation of branch offices in other states and the fact that the tax was not apportioned to the activities which actually took place in Washington. The instant case is distinguishable since, as previously indicated, WOSCA has not shown that a multiple burden actually exists, or that there is a risk of one. Furthermore, the activities of WOSCA, for all practical purposes, occur only in Washington.

WOSCA cited *Spector Motor Service, Inc. v. O'Connor* (1950), 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573, without extended discussion of its applicability. There, a franchise tax, measured by net income, on the privilege of doing business within the state was held unconstitutional as applied to an out-of-state corporation whose business as a carrier was entirely interstate. The tax involved herein is not a tax on the privilege of doing interstate business; so *Spector Motor Service* is distinguishable. Interstate commerce can be conducted without the services of WOSCA. The members could

arrange their transactions individually and enjoy the tax immunities of the common clause. But a local corporation, organized under the laws of Washington, performing local activities and serving local establishments, is subject to the tax.

Particular mention has not been made thus far of the item labeled "Railroad stop-off charge," claimed by the Tax Commission to be among the taxable services of WOSCA. We agree with WOSCA's contention that this item is inseparable from the actual transportation charges of carriers. It is therefore within that portion of the trial court judgment exempted from this appeal by the assignments of error.

The proceeds derived from all other items are taxable. For the reasons indicated herein, the trial court decision is reversed to the extent appealed from.

FINLEY, C. J.

WE CONCUR:

HILL, J.

DONWORTH, J.

OTT, J.

HUNTER, J.

Exhibit No. 8 Case No. 31739 Admitted 1/26/62

WOSCA Members' Costs to Be Added to Lowest Applicable Railroad Carload Rate Per 100 Pounds

At Seattle, Wash.	*From Boston*	*From New York*	*From Philadelphia*	*From Chicago*	*From St. Louis*	*Cotton Pc. Goods, etc.*	*All Other Freight*
Loading and consolidation	30	37	37	35½	30	20	35
Railroad stop-off charge	16½	09½	09½	09½	09½	11	11
All-risk Insurance	02	02 Y	02	01	01	01	01
WOSCA Overhead	02½	02½	02½	02½	02½	02½	02½
Administration and Billing	29	29	29	25	25	27	27
Unloading and segregation	18½X	18½X	18½X	18½X	18½X	18½X	18½X
Store door delivery	24	24	24	24	24	24	24
Total (per 100-lb.)	$1.22½	$1.22½	$1.22½	$1.16	$1.10½	$1.04	$1.19
At Tacoma (Total)	$1.20 X	$1.20 X	$1.20 X	$1.13½X	$1.08 X	$1.01 X	$1.16½X
At Spokane (Total)	$1.22 Z	$1.22 Z	$1.22 Z	$1.15½Z	$1.10 Z	$1.03½X	$1.18½X
At Portland (Total)	$1.23 X	$1.23 X	$1.23 X	$1.16½X	$1.11 X	$1.04½X	$1.19½X

If no Store Door Delivery Ordered: Deduct 24 cents at Seattle, 25 cents at Tacoma, 27 cents at Portland, and 24 cents at Spokane.

Reference Mark Explanation:

X — Plus 14 cents per shipment irrespective of weight which goes exclusively to Transfer Company.
Y — Insurance company from New York only gets 6 cents surcharge per shipment regardless of weight.
Z — Plus 10 cents per shipment irrespective of weight which goes exclusively to Transfer Company.

Note: If supplier loads car at origin and member unloads car direct at destination, charge member only.

1. Proper lowest carload rate applicable	Varies
2. Stop-off charge applicable from origin used	Varies
3. All-risk insurance applicable from origin used	Varies
4. WOSCA Overhead charge (2½ cents cwt.)	$0.02½
5. Administration and billing cost from origin used	Varies
6. A flat $5.00 per car which goes to consolidator in lieu of all otherwise applicable consolidation and loading costs	$5.00

APPENDIX B

RULE 50. RULES ON APPEAL OF THE SUPREME COURT OF WASHINGTON

REVISED CODE OF WASHINGTON, VOL. O, p. 28

Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing.

Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Three copies each of the petition for rehearing and of the answer thereto, if called for, shall be filed with the clerk.

Petitions for rehearing and answers thereto may be printed, mimeographed, or typewritten. If a petition for rehearing be granted, the court may require additional copies of the petition, answer and briefs to be supplied in the manner indicated by the court.

Adopted Nov. 22, 1950, effective Jan. 2, 1951; rule amended, adopted Nov. 17, 1952, effective Jan. 2, 1953.

APPENDIX C

NOTICE OF ORDER DENYING PETITION FOR REHEARING

THE SUPREME COURT
State of Washington
Olympia

February 14, 1962

Honorable John J. O'Connell
Attorney General

Mr. Timothy R. Malone, Assistant

Temple of Justice
Olympia, Washington

Wright, Booth & Beresford
Mr. Robert O. Beresford
Mr. Fred H. Tolan
Mr. Donald P. Lehne

700 American Building
Seattle 4, Washington

Gentlemen:

Re: No. 35726 Wash. Oregon Shippers Co-op. v. Schumacher and Squire

The petition for re-hearing in the above-entitled case was denied by an order dated February 13, 1962.

CLERK'S RULING ON COSTS

The opinion in the above case was filed on December 14, 1962. On December 21 the appellants filed a cost bill in the total amount of $344.72. Included in the total amount was an item of $5.00 for clerk's fee.

Since the appellants paid no fee in this case, the item for clerk's fee is disallowed.

Very truly yours,

WILLIAM M. LOWRY, Clerk

WML:hlt

APPENDIX D

EXCERPTS FROM PETITIONER'S COMPLAINT TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY, CAUSE NO. 31739

IX.

. . . That the tax as assessed is assessed upon plaintiff's activity of arranging, as agent, for the consolidation and shipment for its members of goods in interstate commerce. That the aforesaid Chapter 180, Laws of 1935, as amended, is a measure intended to and having the effect of laying a burden upon interstate commerce by denying to the plaintiff the right to continue its activities of consolidating and shipping goods in interstate commerce unless plaintiff pays a tax to the State of Washington as above set forth. That the imposition of the said taxes and penalties upon the plaintiff, as claimed by the above-named defendants, and each of them, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States in that the said tax constitutes a direct burden upon interstate commerce and the instrumentalities thereof contrary to and in violation of the provisions of the said Clause 3 of Section 8 of Article I of the Constitution of the United States, and takes plaintiff's property without due process of law in violation of the 14th Amendment of the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington.

APPENDIX E

EXCERPTS FROM CONCLUSIONS OF LAW OF THE TRIAL COURT, SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

I.

That the tax herein sought to be imposed by the defendants to the extent measured by the freight bills paid by plaintiff to interstate carriers for interstate movement of goods owned by plaintiff's members constitutes a direct burden on interstate commerce.

II.

That the tax sought to be imposed by the defendants to the extent measured by payments other than freight bills paid to plaintiff by plaintiff's members constitute a direct burden on interstate commerce.

APPENDIX F

REVISED CODE OF WASHINGTON 82.04.220, 82.04.290, AND 82.04.296

82.04.220 *Business and occupation tax imposed.* There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.290 *Tax on other business or service activities.* Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.260, 82.04.270, 82.04.275 and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The additional tax imposed in RCW 82.04.296 shall not apply to persons or activities taxable under this section.

82.04.296 *Additional tax imposed.* From and after the first day of May, 1955, there is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed by this chapter, other than those activities taxed pursuant to RCW 82.04.260, an additional tax in the amount of sixty percent of the tax payable under this

chapter: *Provided*, That from April 1, 1959 the additional tax imposed under this section shall be in the amount of seventy-six percent of the tax payable under this chapter. To facilitate collection of this additional tax, the tax commission is authorized to adjust the basic rates of persons to which this section applies in such manner as to reflect the exact amount of the additional tax hereby imposed.

APPENDIX G

REVISED CODE OF WASHINGTON

82.32.150 AND 82.32.180

82.32.150 *Contest of tax—Prepayment required—Restraining orders and injunctions barred.* All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

82.32.180 *Court appeal—Procedure.* Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in this chapter, or within thirty days after the date of the notice denying a hearing, or within thirty days after the date of the order provided in RCW 82.32.170. In the appeal the taxpayer shall set forth the amount of the tax imposed upon him which he concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the tax commission within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county. Within ten days after filing notice of appeal, the taxpayer shall file with the clerk of the superior court a good and sufficient surety bond pay-

able to the state in the sum of two hundred dollars, conditioned to diligently prosecute the appeal and pay the state all costs that may be awarded if the appeal of the taxpayer is not sustained.

The trial in the superior court on the appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by him is correct, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party shall be allowed to appeal to the supreme court in the same manner as other civil actions are appealed to that court.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the commissioner for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

APPENDIX H

JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Plaintiff*, vs. WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Defendants*.	No. 31739

PERMANENT INJUNCTION

THIS MATTER Having come on regularly for trial on the 26th day of January, 1960, before the Honorable Raymond W. Clifford, Judge of the above-entitled court; the plaintiff being present in court through its attorneys, Robert O. Beresford and Fred H. Tolan; the defendants being present in court through their attorney, John W. Riley, Deputy Attorney General, on behalf of John J. O'Connell, Attorney General of the State of Washington; testimony having been taken and stipulated facts having been filed; both parties having filed written briefs and submitted oral arguments; and the Court being familiar with the records and files herein, and having heretofore entered its findings of fact, and having concluded as a matter of law that the tax herein sought to be imposed by the defendants to the extent measured by the freight bills paid by plaintiff to interstate carriers for interstate movement of goods owned by plaintiff's members constitutes a direct burden on interstate commerce; and that the tax sought to be imposed by the defendants to the extent measured by payments other than freight bills paid to plaintiff by

plaintiff's members constitutes a direct burden on interstate commerce;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I.

That the temporary restraining order heretofore entered on the 8th day of September, 1959, temporarily restraining and enjoining the defendants, William S. Schumacher and Clark Squire, as Tax Commissioners of the State of Washington, and all persons acting under their direction or under the direction of either of them, from enforcing, proceeding to enforce, to taking any measure to enforce Chapter 180 of the Laws of 1935, as amended, to the date hereof, insofar as the defendants, and each of them, may apply or attempt to apply the same to the taxation of plaintiff's present business activities, be, and the same hereby is, made permanent; and the defendants, and each of them, as members of the Washington State Tax Commission, as well as any person acting by or under the direction of the defendants and or either of them as members of the Washington State Tax Commission, be, and they hereby are, restrained and enjoined from imposing or attempting to impose, or collecting, or attempting to collect, any alleged Business and Occupation Tax, penalties or interest thereon, or commencing any prosecution or summary process against the plaintiff for the purpose of assessing or claiming any Business and Occupation Tax, penalties or interest, under the terms of Chapter 180 of the Laws of 1935, as amended.

DONE IN OPEN COURT This 19th day of May, 1960.

RAYMOND W. CLIFFORD, Judge

Presented by:
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Of Robert O. Beresford and Fred H. Tolan
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May 19, 1960. Copy Received and Notice of Presentation Waived

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State of Washington

APPENDIX I

OPINION OF THE TRIAL COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Plaintiff*,
vs.
WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Defendants*.
No. 31739

MEMORANDUM OPINION

Plaintiff is a non-profit corporation, its membership consisting of 119 business entities of Washington and Oregon. These entities purchase commodities at various points of origin on the Atlantic Seaboard and in the Midwest, and in quantities less than carload. In order to secure the advantage of carload railroad rates, these entities incorporated plaintiff to perform the function of consolidating shipments into carload lots. Plaintiff's function includes contractual relations with independent freight consolidators at the various points where carloads are originated; the payment of the railroad freight bills; the breakdown of these bills and other charges incident to the service, to determine the total charge to be paid by each entity; the receipt and expenditure of a fund provided by the aggregate of the payments made by each of the several entities; and the maintenance of an accounting office, equipment, and personnel in Seattle to do the bookkeeping.

The stipulated facts include the following: "The 'Business and Occupation Tax here' in question is sought to be measured by all sums paid by each member of plaintiff to plaintiff for the freight bills herein-

before described, together with the service charge added thereto, as itemized in Exhibits 7 and 8, except that no Business and Occupation tax is sought to be measured by that portion of the billing representing advances made by consolidators at loading points in the East."

Reference is made to the stipulated facts for a more detailed statement concerning all of the foregoing matters.

The principal contention of plaintiff is that the tax constitutes a direct burden on interstate commerce.

The plaintiff is a freight forwarder as defined in the Interstate Commerce Act, and exempt from the operation of that Act. USCA Title 49, Sec. 1002 (5) (8c).

Defendants rely upon Yakima Fruit Growers Ass'n v. Henneford, 187 Wash. 252. The decision does not discuss interstate commerce, and is confined to the matter of exemption. None of the hauls in the case at bar have origin and destination within the state of Washington.

Plaintiff relies inter alia upon Sound Stevedoring Co. v. Tax Commission, 82 L.ed. 68 (189 Wash. 131) and Gwin, White & Prince Inc. v. Henneford, 83 L.ed. 272 (193 Wash. 451).

In the Sound Stevedoring case it was held (82 L.ed. p. 72):

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. (Citing cases) The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor. An independent contractor

undertaking to navigate a vessel would have the same protection as a pilot agreeing to navigate it himself." . . .

"The business of appellant, insofar as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state."

In the Gwin case it was said (83 L.ed. p. 275):

"The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles. (Citing cases)" . . . "But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state."

In essential particulars the facts of the Gwin case are very like those in the case at bar, and the principles announced in both the Sound Stevedoring and Gwin cases are controlling here.

Defendants move for an increase of bond pendente lite. Under the facts and the law as determined the issuance of a restraining order was proper. R.C.W. 82.32.150. In oral argument counsel for defendants suggested plaintiff might dissolve and thus circumvent collection of the tax in event of an unfavorable result. The legislature has provided for this contingency. R.C.W. 82.32.260. Supplemental proceedings in aid of collection are provided by R.C.W. 82.32.210, 220, 230 and 240.

The plaintiff will prevail on the merits, and the motion for increased bond is denied.

s/ RAYMOND W. CLIFFORD
January 29, 1960 Judge

APPENDIX J

REMITTITUR OF THE SUPREME COURT OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Thurston County No. 31739

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Respondent*, vs. WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Appellants*.	No. 35726

REMITTITUR

This is to certify that the opinion of the Supreme Court of the State of Washington filed on December 14, 1961, became the final judgment of this court in the above entitled case on February 13, 1962. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three Hundred Thirty-nine and 72 100 ($339.72) Dollars against the respondent.

The petition for rehearing was denied on February 13, 1962.

cc: Court Reporter
Hon. John J. O'Connell
Mr. Timothy R. Malone
Wright, Booth & Beresford
Mr. Robert O. Beresford
Mr. Fred H. Tolan
Mr. Donald P. Lehne

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of February, A.D. 1962.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington.

Office Supreme Court, U.S.
FILED
JUN 7 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1961

No. 958

WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *Petitioner*,

v.

WILLIAM S. SCHUMACHER and CLARK SQUIRE, as Tax Commissioners of the State of Washington, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE PRINTING PLANT OLYMPIA, WASH. 1962

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATUTES INVOLVED

In addition to the provisions of the Washington Law relating to the business and occupation tax found in Appendix F of the Petition for Writ of Certiorari, viz., RCW 82.04.220, .290 and .296, cer-

tain other provisions of this same law should be brought to this Court's attention.

Thus, RCW 82.04.080 provides as follows:

"'Gross income of the business' means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses."

And RCW 82.04.460 provides as follows:

"Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this chapter, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state."

II

ARGUMENT

A. No Substantial Question Involving the Commerce Clause of the Federal Constitution Is Presented.

The Articles of Incorporation (Ex. 1) of Washington-Oregon Shippers Cooperative Association, Inc., the Petitioner, state quite succinctly what its purposes and activities are:

> "The purposes for which this corporation is formed are as follows:
>
> "(a) To procure the pooling and consolidating outbound and inbound from and to the Pacific Northwest, transportation and distribution of merchandise for its members on a nonprofit cooperative basis at carload, truckload or other volume rates.
>
> "(b) To procure for its members a more prompt, economical and efficient distribution of their merchandise or products.
>
> "* * *"

As stated by the Washington State Supreme Court in its decision:

> "WOSCA makes no purchases or sales in interstate commerce. The only real activity performed by WOSCA, except for the policy-making function of its Board of Trustees, is that of entering into contractual arrangements with independent contractors. Although some of the contracts entered into by WOSCA concern activities occurring outside of the state, WOSCA is not engaged in these activities; it

merely *procures them as a service for its members.* * * *" (Petition, p. 5A) (Emphasis supplied)

Petitioner's activities are comparable to the activities of a wholesaler. It, in effect, buys the services of independent contractors at the cheapest possible rate, and is thus able to resell, in effect, the services to its members and pass on to them the savings. The tax imposed by the State of Washington on Petitioner's activities is measured by amounts received by Petitioner from its "members" for these "commodities" (insurance, unloading and segregation, delivery, etc.) plus Petitioner's "overhead". (See Ex. 8—Petition 13A)[1]

From this it is readily seen that the gross income used as the measure of the tax in this case is derived from purely local activities or services; for this gross income represents the Petitioner's "overhead" plus charges made by Petitioner to its Washington members for the procurement (and *not the performance*) of certain services by others. This procurement is itself a local, taxable service.

Admittedly, the procurement of these services does involve the formation of contracts with independent contractors, some of whom are located out-

[1]The Court will observe that charges for actual transportation in interstate commerce and railroad "stop off charges" collected by Petitioner are not to be included in the measure of tax, under the decision of the Washington Supreme Court. (See the lower court's discussion of this point: Petition 12A.)

side of the State of Washington. But, as stated by Mr. Justice Stone:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, *unless the performance is within its protection*, is a proposition no longer open to question. * * *" (Emphasis supplied) *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938), at 253.

Now, Petitioner has not shown — because it cannot show — that any of the activities of the independent contractors, the procurement of whose services have been taxed, are "within the protection of the commerce clause."

By procuring the services of the various independent contractors, Petitioner does aid interstate commerce. But *local* activities in aid of interstate commerce are not themselves entitled to the protection of the commerce clause. This is clear from *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937), a case also arising from the State of Washington and also involving the service category of the Washington business and occupation tax. This case decided that, although Puget Sound Stevedoring Co. could not be taxed on its gross receipts derived from actual stevedoring operations, it could be taxed on its gross receipts derived from the procurement of longshoremen for the master of the ship, the master actually directing the

stevedoring. Certainly the taxable activities of the taxpayer in that case were just as much in aid of interstate commerce as are the activities of the Petitioner in this case.

As stated in *Gwin, White & Prince v. Henneford*, 305 U. S. 434 (1939):

> "* * * not every local tax paid upon gross receipts derived from participation in interstate commerce is forbidden. * * *" (at p. 438)

Petitioner argues that the tax in question results in a discriminatory burden on interstate commerce. As Petitioner points out, large shippers do not need to belong to such an organization as WOSCA in order to obtain the cheapest possible handling of their shipments; and small shippers do not need the use of such an organization when they want only intrastate shipments handled. (Petition, pp. 13-17) But these circumstances do not, as Petitioner argues, render the tax on the Petitioner *ipso facto* discriminatory.

Even if there were "discrimination" (*arguendo*), against whom is the tax discriminatory? Against the Petitioner's members? But these members are not engaged in interstate commerce, and they are not the taxpayer in this action. For the same reasons it follows that the Petitioner is not a victim of "discrimination." It is admittedly not engaged in interstate commerce. And the mere fact that the Petitioner's operations are somewhat unique

and relate to interstate shipments does not produce discrimination.

To illustrate the fallacy of the Petitioner's contention, the following example may be helpful. Assume that in State X, all oil comes from out of state. Assume also that small oil companies whose products are brought to market from points outside State find it economically necessary to use the terminaling facilities of an independent terminaling company in State X, whereas larger oil companies can afford to set up their own terminaling facilities. To tax the operations of the independent terminaling company, even though this company facilitates interstate commerce, and handles only shipments received in interstate commerce does not produce a burden upon interstate commerce or discrimination of any kind. Petitioner can cite no authority for such an extreme proposition.

B. THE DECISION OF THE WASHINGTON STATE SUPREME COURT IS NOT IN CONFLICT WITH GWIN, WHITE & PRINCE V. HENNEFORD, 305 U. S. 434 (1939), AND NO POSSIBLE RISK OF MULTIPLE TAX BURDENS ON INTERSTATE COMMERCE EXISTS.

In Gwin, White & Prince v. Henneford, the Washington business and occupation tax was struck down by this Court on the grounds that the tax there undertook

> "* * * to lay a privilege tax measured by gross receipts derived from activities in such [interstate] commerce which extend

> beyond the territorial limits of the taxing state." 305 U. S. 434, at 439.

And the tax in *Gwin* discriminated against interstate commerce.

> "* * * since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. * * *" *Ibid.*

The reason for this extra-territorial effect of the tax, and reason why the risk of multiple taxation was present are found in the fact that the taxpayer in *Gwin* operated outside the State of Washington through its own representatives; that is, through them it negotiated sales, executed contracts of sale, made deliveries, and made collections, all of these activities taking place outside the state. Furthermore the tax in *Gwin* was measured by taxpayer's gross receipts which included proceeds from the sale of property it sold in interstate commerce, which proceeds were remitted to the taxpayer's principals after withholding of the taxpayer's commission for its services.

In contrast, the Petitioner in this case has absolutely no activities outside of the State; another State could not possibly tax its activities, whereas another State could have taxed the activities of the taxpayer in *Gwin*. And thus, in this case, the tax imposed on the Petitioner does not have any extra-territorial effect, in contrast to the tax in *Gwin*.

It should be noted that, under RCW 82.04.460,

persons taxable under the service category of the business and occupation tax may apportion their gross income when they maintain places of business both within and without the state. (This provision was enacted by § 4, chapter 225, Laws of 1939, and thus was enacted too late to have any application in *Gwin*.) Certainly this provision is designed to obviate any commerce clause or due process clause problems in the application of the business and occupation tax. Yet, Petitioner has at no time attempted to take advantage of this provision, and for a very good reason: it does not maintain a place of business outside the state, and transacts no business there. This illustrates strikingly the difference between the instant case and *Gwin*.

Petitioner argues that by imposing the tax in this case, interstate commerce is exposed to multiple tax burdens. (Petition, pp. 17-19) But if these so-called multiple burdens exist at all, they exist only because different activities of different companies are being taxed. The Petitioner is not the same entity as its independent contractors, and the taxable activities of the Petitioner are not the same as the taxable activities of its independent contractors. Therefore, Petitioner's allegations at best do not illustrate "multiple burdens" which are incompatible with the commerce clause.

C. No Substantial Question Involving the Due Process Clause of the Federal Constitution Is Presented.

Certainly a Washington corporation, which has no activities outside of the State of Washington, may be taxed under the due process clause of the Federal Constitution by the State of Washington for services which it renders to its Washington members. Since the State does not here attempt to tax any activities of the taxpayer taking place outside the State, or to measure the tax by any such activities, we fail to see how the State of Washington can lack jurisdiction to tax these activities under the due process clause. Furthermore the taxpayer is admittedly a Washington corporation which is enjoying its corporate franchise by conducting business activities within the State of Washington. Accordingly, Petitioner lacks the slightest vestige of a due process question.

D. No Question Involving the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution Was Raised In Either the State Superior Court or the State Supreme Court; Accordingly, No Such Question Is Reviewable by This Court.

Petitioner argues (Petition, p. 19) that the imposition of the business and occupation tax upon it in this case violates the equal protection clause of the Fourteenth Amendment. While we have pointed out above that there is no factual or legal foundation for arguing that the tax in question is discrimi-

natory, it must be pointed out that neither in the complaint filed in Superior Court (Petition, Appendix D), nor in the Superior Court's opinion (Petition, Appendix I), nor in the opinion of the State Supreme Court (Petition, Appendix A), is there any mention of a question involving the equal protection clause of the Fourteenth Amendment. Accordingly, any such question was not "* * * timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Rule 23, l. (f), Supreme Court Rules. See *McGoldrick v. Compagnie Gén. Transatlantique*, 309 U. S. 430 (1940).

III

CONCLUSION

Petitioner argues, in effect (Petition, pp. 20-21), that if it is subject to taxation, the service which it provides its members will be less attractive to its members than if it were immune from taxation. This may be true, but it is irrelevant. Petitioner's members cannot set up a separate corporation for their own financial advantage, and then be heard to complain that, by taxing the corporation, this financial advantage is somewhat lessened. The tax burdens on this corporation cannot be thrown off simply because these burdens somewhat diminish the financial advantage which it brings its members.

The Petitioner is a Washington corporation engaged in business activities within the State of

Washington. The tax in question is fair and non-discriminatory. It cannot and does not impinge upon interstate commerce.

Accordingly, no substantial Federal question is presented. Therefore, the questions presented by the Petitioner do not merit review by this Court, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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